HENDERSON COUNTY "911"
EMERGENCY COMMUNICATIONS DISTRICT

August 17, 2007

Tennessee Ethics Commission
SunTrust Bank Bldg.
201 4th Ave. N., Suite 1820
Nashville, TN 37243

Attached you will find a copy of the Henderson County 911 District Board's minutes of the July 19, 2007 meeting. The District voted to adopt the Ethics and Conflict of Interest Policy of Henderson County Local Government. Should any further information be needed, please contact me.

Thank you for your assistance and trusting this is the information that is required of our District.

Respectfully,

Pamelia Tolley, Director

35 E. Wilson Street
Lexington, TN 38351
901-968-5911

The Board of Directors of Henderson County E-911 met in a regular meeting July 19, 2007 in the E.O.C. Conference Room. Willett Coffman, Chairman, called the meeting to order. Current members introduced themselves to new members.

Board members present: Emily Blankenship, Doug Melton, Undra Moffett, Ida Myracle, Barry Roberts, Joe Tate and Kenneth Vineyard. Also present Pam Tolley, Director, Sherry Mills, Assistant Director and a majority of the full time dispatchers and Tammy Youngson.

Minutes of the last meeting having been distributed and read earlier were approved on a motion by Joe Tate, seconded Kenneth Vineyard.

Ida Myracle read the final treasurer's report for the fiscal year. Doug Melton moved to approve, seconded Emily Blankenship. Motion carried.

Pam explained how 911 was funded. $86,000.00 in state money, payments from phone and wireless providers and grants. Willett explained the CD's, where the money came from and what it is used for.

Pam's report: The TIES program for testing dispatchers on-line is being worked on to reduce duplication of some areas.

All dispatchers are IS-100 qualified for the National Incident Management System (NIMS), except Lisa. All dispatchers will have to go through IS700 training on-line.

A change in the 911 laws in Tennessee, effective 7-1-2007, now calls for harsher punishment for false 911 calls.

Jennifer Phillips has been to TIES training and Lisa is scheduled to go later. Training sessions are only conducted once a month.

Lockers have been ordered, but are on back order.

There was discussion regarding the liability issue when someone who:

(1) Is supposed to have clocked out but is still filling in for someone who might be delayed in reporting to work while volunteering in an emergency situation:

(2) Is clocked in while going to pick up meals for dispatchers.

Pam said Chad Wood (County Attorney) would be happy to come to a meeting to answer questions. Barry Roberts stated that in case #2 the 911 vehicle should be used rather than a personal vehicle. Pam stated that she would discuss Blake Stanfill's situation with Murphy so that Blake would be "turned loose" as quickly as possible from a fire. Willett reiterated that allowing Blake to be late to work because of an emergency/volunteer situation was different from other personal types of issues.

Dispatchers attended the meeting to clarify some points about the new shift schedule that is being considered. The proposal is two people per shift 24/7. It was explained there is a short fall of income. Everything has to work within the budget, raises and equipment. The Board is trying to meet the requirements of the County commission and also do what is in the best interest of the dispatchers. The dispatchers wanted a month to

work on a schedule themselves. They are to submit two, and prioritize them, because we need to make sure it is within the budget. Dispatchers left the meeting.

Due to the requirements by the State 911 Board that the local 911 office have an ethics policy in place Pam offered three options:

(1) Adopt the policy that TASC has developed,
(2) Create a policy, or
(3) Adopt the Henderson County Government policy.

Pam recommended the third option. Ida Myracle moved to adopt the ethics policy of the Henderson County Government, Doug Melton seconded and motion carried.

Willett Coffman appointed a committee consisting of Barry Roberts, Doug Melton and Emily Blankenship to deal with any ethics issues as they arise.

Three new dispatchers chairs are needed. Doug Melton moved to make available $3,000.00 to purchase the chairs. Barry Roberts seconded. Motion carried.

There being no further business. Kenneth moved to adjourn. Ida Myracle seconded.

Next meeting August 16, 2007, 5:0 p.m.

Chairman

Secretary

ETHICS AND CONFLICTS OF INTEREST

FOR

COUNTY OFFICIALS IN TENNESSEE

David Connor
CTAS Legal Consultant

March 15, 2006

ETHICS

The issue of ethics in state and local government has dominated the news media in Tennessee over the last year. A number of scandals involving elected officials inspired a new prohibition on "consulting fees" for government officials in 2005 and eventually led to an extraordinary session of the General Assembly at the beginning of 2006 to deal with the topic of ethics. During that session, the General Assembly passed the "Comprehensive Governmental Ethics Reform Act of 2006" (the Ethics Act). This wide-ranging act created a new State Ethics Commission, established substantial new registration and reporting requirements for lobbyists and their employers, and enacted new provisions to set limits on gifts and require disclosure of conflicts of interest for certain state officials. The law also included a requirement for local governments to adopt their own set of ethical standards related to certain issues by June 30, 2007. In addition to the new Ethics Act, there are several other state and federal laws governing ethics in county government. A discussion of these laws follows.

Mandate of Adoption of Local Government Ethical Standards

The Ethics Act mandates that governing bodies of counties and municipalities adopt their own local ethical standards by June 30, 2007. Under the law, these standards should relate to regulations dealing with disclosure and/or limits on gifts and the disclosure of conflicts of interest. The law expressly states that these standards do not include personnel, employment or operational regulations of local government offices. Where the general law, a local option law or private act already establishes regulations and limitations, any local ethical standards cannot be less restrictive than those in other laws. The standards adopted by a county commission will apply broadly to all boards, commissions, authorities, corporations, or other instrumentalities of a county. Additionally, they apply to utility districts in the county. Under the law, CTAS and MTAS are directed to draft and distribute model policies to provide guidance and direction to local governments. CTAS intends to have model policies drafted and distributed to counties by June of this year. This will give county legislative bodies a full year to consider the models and decide to adopt a model or draft standards of their own. Individual policies adopted by a local government are filed with the State Ethics Commission, or in the alternative, the local government files a statement that it has adopted a CTAS or MTAS model policy. Enforcement of the new standards remains as provided under current law and presumably will be up to the local district attorney. A failure or refusal to adopt standards by a local governing body by the deadline subjects its members to ouster.

Financial Conflicts of Interest

Most county governments in Tennessee do not experience lobbying at the local level like it happens at the General Assembly. Generally speaking, where there is a danger of a conflict of interest or undue influence of a county official, it relates not to the exercise of legislative authority but to the exercise of purchasing power.

General Law. In this area, county officials and employees are regulated by a conflict of interest statute (T.C.A. § 12-4-101) which prohibits a county official or employee who has the duty to vote for or oversee any work or contract from having a direct financial interest in the work or contract. This statute has been interpreted by the Attorney General even to prohibit a county commissioner from voting on a budget that includes appropriations for a contract if the county commissioner has a direct financial interest in the contract. The penalty for a violation of this statute is severe, requiring forfeiture of all compensation paid under the contract, dismissal from office, and ineligibility for the same or similar office for ten years. (T.C.A. § 12-4-102). Besides prohibiting direct conflicts of interest, the statute also requires disclosure of any indirect financial interests.

This basic conflict of interest statute (T.C.A. § 12-4-101) states in pertinent part:

> (a) It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility districts, human resource agency, or other political subdivision created by statute shall or may be interested, to be directly interested in any such contract. "Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation....
>
> (b) It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be indirectly interested in any such contract unless the officer publicly acknowledges such officer's interest. "Indirectly interested" means any contract in which the officer is interested but not directly so, but includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality or county....

This statute only prohibits conflicts of interest when the county official has a financial interest and will be voting for, overlooking, letting out, or in some manner superintending the work or contract. For example, a county clerk could probably bid on providing ambulance service for the county, or for selling computer equipment to the highway department, if that county clerk would not be voting for or overlooking the contract in any manner. However, a trustee could not bid on or sell computer equipment to the trustee's own office.

Only pecuniary interests are prohibited. If a county official receives no direct pecuniary interest, but is interested in a contract from another standpoint, that interest would not be a prohibited conflict of interest so long as the official gained no personal financial benefit from the contract. An example would be a court clerk who hires a friend to work in the court clerk's office. Since the court clerk would gain no financial benefit, no prohibited conflict of interest would exist.

The question often arises as to whether it is proper for a county official to have authority over a matter that will have a direct financial benefit to a relative, such as purchasing copying equipment from a nephew. The question becomes more complex when the person who will receive the direct financial benefit is the spouse of a county official. In a question involving the propriety of a person who was a member of the county board of education voting on matters affecting the salary of the spouse of that board member, the Attorney General has opined[1] that if the spouses commingle assets, the board member has an indirect conflict of interest and must acknowledge the interest and recuse himself or herself from voting. If the spouses do not commingle assets, it was the opinion of the Attorney General that the board member should not vote as a matter of public policy.

The disclosure of indirect interests is required by the statute, which calls for "public acknowledgment" of such interests. What is necessary for public acknowledgment is unclear, especially in the context of an official such as the register of deeds acting independently, as opposed to a member of the county legislative body announcing at a regular meeting that the member has an indirect interest prior to a vote. A county official should therefore be careful in indirect conflict of interest situations to provide public notice of these interests prior to taking any action. For example, if a county clerk purchases supplies from a corporation in which the clerk owns a small minority (not plurality) interest, this interest must be disclosed publicly. Because the county clerk has no natural public forum, some form of written public notice via bulletin boards in the courthouse and notice in a newspaper of general circulation in the county may be appropriate.

It is important to note that the conflict of interest statutes make no distinction based on amount of financial interest where there is a direct interest, which would appear to mean that any direct financial interest is prohibited. However, the Attorney General has indicated that a significant interest might be required, as opposed to a *de minimis* interest. Since it would be very difficult to determine what a court might hold to be significant, and since the penalty for violation of the conflict of interest statute is so severe, a county official would be well advised to consider any interest as being significant.[2]

Other Statutory Conflict of Interest Provisions. The 1957 Purchasing Law (T.C.A. § 5-14-101 *et seq.*) and the 1981 Financial Management Act (T.C.A. § 5-21-101 *et seq.*) both contain conflict of interest provisions. These are optional general laws which may or may not be in effect in a particular county. All of these provisions are at least as stringent as the general statute (T.C.A. § 12-4-101) discussed above.

The 1981 Financial Management Act contains the most stringent conflict of interest provisions. This statute (T.C.A. § 5-21-121) provides:

> (a) The director, purchasing agent, members of the committee, members of the county legislative body, or other officials, employees, or members of the board of education or highway commission shall not be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of any supplies, materials or equipment for the county.

(b) No firm, corporation, partnership, association or individual furnishing any such supplies, materials or equipment, shall give or offer, nor shall the director or purchasing agent or any assistant or employee accept or receive directly or indirectly from any person, firm, corporation, partnership or association to whom any contract may be awarded, by rebate, gift or otherwise, any money or other things of value whatsoever, or any promise, obligation or contract for future reward or compensation.

In addition to county officials and officers, this statute includes county employees within its prohibition. Further, the statute makes no distinction as to whether the interested person has any authority over the purchasing decision. The broad language of this statute prohibits county officials, officers and employees from having any interest in any purchases or contracts made by the county.

No special definitions of direct or indirect interests are found in the 1981 Financial Management Act. Therefore, the general law definitions should be used for purposes of application of this provision involving purchasing of supplies, materials or equipment for the county. Under this Act, the Director of Finance or a Purchasing Agent makes purchases for county offices. However, even though a Purchasing Agent makes the purchase following a requisition from a county official, the official may not bid on the contract because of the broad language of the statute.

A similar situation holds in those counties under the County Purchasing Law of 1957, but the prohibition does not include county employees. However, unlike the 1981 Act, it does cover contractual services. The conflict of interest statute (T.C.A. § 5-14-114) contained in the County Purchasing Law of 1957 states:

(a) Neither the county purchasing agent, nor members of the county purchasing commission, nor members of the county legislative body, nor other officials of the county, shall be financially interested, or have any personal beneficial interest, either directly or indirectly, in any contract or purchase order for any supplies, materials, equipment or contractual services used by or furnished to any department or agency of the county government.

(b) Nor shall any such persons accept or receive, directly or indirectly, from any person, firm, or corporation to which any contract or purchase order may be awarded, by rebate, gift or otherwise, any money or anything of value whatsoever, or any promise, obligation or contract for future reward or compensation.

(c) A violation of this section is a Class D felony.

Purchasing regulations of Highway Departments. In those counties under the County Uniform Highway Law, a very strict conflict of interest statute applies. This statute is T.C.A. § 54-7-203(a) which follows:

Neither the chief administrative officer, county highway commissioner, member of the county governing body nor any employee of the county road department shall be financially interested in or have any personal interest, either directly or indirectly, in the purchase of any supplies, machinery, materials, or equipment for the department or

system of roads for the county, nor in any firm, corporation, partnership, association or individual selling or furnishing such machinery, equipment, supplies and materials. A violation of this section constitutes official misconduct and is a Class C misdemeanor and is grounds for removal from office.

Note that this prohibition is so broad as to preclude all employees of the highway department, whether or not they have any discretion or control over the purchase, from having a direct or indirect interest in these purchases.

Prohibition on Consulting Fees

In 2005, the General Assembly passed a law to prohibit state and local government elected officials from receiving a fee, commission or any other form of compensation for performing "consulting services." (T.C.A. §§ 2-10-123 and 2-10-124.) As defined with respect to local officials, the term "consulting services" means services to advise or assist a person or entity in influencing municipal or county legislative or administrative action, including, but not limited to, services to advise or assist in maintaining, applying for, soliciting or entering into a contract with the local government represented by such official. (T.C.A. § 2-10-122.) Such fees do not include compensation paid by the state, a county, or municipality. In addition, there are certain types of gifts and benefits listed in T.C.A. § 3-6-114(b) and (c) which are not prohibited. Still, most anything of value provided by a vendor to a county official for assistance or support in getting a contract with the county would be prohibited under this law. Covered officials include members-elect to the county legislative body even before they have taken office. As the law originally passed, the definition for the term "consulting services" exempted the practice of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding or rule making procedure. In the 2006 extraordinary session of the state legislature, the General Assembly removed this exemption. Therefore, county officials who are also attorneys cannot take a fee to represent a client before a board or commission of the county. A violation of this prohibition is a Class A misdemeanor unless the conduct giving rise to the violation would also constitute the offense of bribery in which case the offense is a Class C felony. A person convicted of any violation under this statute is forever afterwards disqualified from holding any office under the laws or TENNESSEE CONSTITUTION. The act took effect July 1, 2005.

Conflicts of Interest Based on Offices or Employment

Any county employee who is otherwise qualified may serve as a member of the county legislative body, notwithstanding the fact that such person is a county employee, except persons elected or appointed as county executive, sheriff, trustee, register, county clerk, assessor of property, or any other countywide office filled by vote of the people or the county legislative body. (T.C.A. § 5-5-102). Countywide officeholders may not be nominated for or elected to membership in the county legislative body. However, deputy trustees, secretaries and assistants may simultaneously hold the office of county legislative body member. Particular care must be taken to publicly acknowledge interests concerning matters relating to employment for such an employee/county legislative body member. Detailed procedures for acknowledging such interests and restricting voting are provided for such county legislative body members (T.C.A. §§

5-5-102 and 12-4-101). A county legislative body member may hold that office and seek another office, such as county clerk, so long as the county legislative body is not filling the position. However, the person cannot hold both positions simultaneously.[3]

Perks and Bribes

Bribery. It is a criminal offense for any elected official to accept any bribe. (T.C.A. § 39-16-102). Bribery, as commonly understood, is the act of giving or receiving a gift for the purpose of effecting the improper discharge of a public duty. A "kickback" is a bribe involving the payment of money or property to an individual for causing the county to buy from, to use the services of, or to otherwise deal with, the person making the payment. A kickback is often viewed as specific inducement for a particular sale, or as a reward for accomplishing a particular purpose.

Bribery is a Class C felony (T.C.A. § 39-16-102), and any county official convicted under this statute may be punished by imprisonment for not less than three nor more than 15 years and fined up to $10,000. (T.C.A. § 40-35-111). Persons convicted of attempting to bribe a public official are subject to the same punishment.

The classic kickback situation, on a county level, involves a county official who is approached by a sales agent and is offered 10% of the purchase price if the county purchases equipment from the agent. The official is influential in the subsequent purchase of the equipment and receives the promised "cut". Both parties are guilty of bribery. It does not matter which party initiated the illegal transaction. Further, if the county official solicited the kickback, the county official would be guilty of bribery regardless of whether the sales agent agreed to pay the bribe. While bribery in terms of money is the most frequent and the most prosecuted form, other business practices that involve the giving of other amenities must be carefully scrutinized.[4]

Perks, which are usually small benefits that have no promise to act in any manner connected with them, generally are not considered a violation of law, but are prohibited by the broad language contained in the Purchasing Act of 1957 and the 1981 Financial Management Act in those counties in which have adopted those laws. However, the difference between a perk and a bribe can be a subtle difference in intent, so a county official should be careful in accepting gifts or other benefits.

It is possible that gratuities or perks, such as free food, lodging, and transportation given to a county official by private parties with whom the official conducts county business, may be considered a bribe. The greater the value of the perk or gratuity, the more difficult it would be to overcome the public's idea that "you don't get something for nothing".

Bribery for Votes. The TENNESSEE CONSTITUTION and statutes also prohibit offering bribes for votes.[5] It is unlawful for any candidate for a county office to expend, pay promise, loan or become pecuniarily liable in any way for money or any other thing of value, either directly or indirectly, or to agree to enter into any contract with any person to vote for or support any particular policy or measure, in consideration of the vote or support, moral or financial, of that person. (T.C.A. § 2-19-121). A violation of this statute, known as bargaining for votes, is a

Class C misdemeanor (T.C.A. § 2-19-123). However, this does not render it illegal to make expenditures to employ clerks or stenographers in a campaign, for printing and advertising, actual travel expenses, or certain other allowed expenditures. (T.C.A. § 2-19-124).

A stronger prohibition against bribing voters is found in the statute which makes it illegal for a person, whether directly or indirectly, either personally or through another person, to pay or give anything of value to a voter to influence the person's vote (or failure to vote) in any election, primary or convention. (T.C.A. § 2-19-126). A violation of this statute is a Class C felony. (T.C.A. § 2-19-128). Voters are also prohibited from accepting bribes, and the same penalty applies. Betting on elections is also prohibited. (T.C.A. §§ 2-19-129 through 2-19-131).

In a case involving the matter of whether the district attorney abused his or her discretion in refusing to bring a quo warranto proceeding against the Mayor of Nashville-Davidson County as requested by an unsuccessful candidate for that office,[6] the Tennessee Supreme Court considered the question of bribery in violation of the bribery statutes and Article 10, Section 3 of the TENNESSEE CONSTITUTION, which states:

> Any elector who shall receive any gift or reward for his vote, in meat, drink, money or otherwise, shall suffer such punishment as the law shall direct. And any person who shall directly or indirectly give, promise or bestow any such reward to be elected, shall thereby be rendered incapable, for six years, to serve in the office for which he was elected, and be subject to such further punishment as the Legislature shall direct.

The allegations of wrongdoing on the part of the Mayor involved distribution of free cheese and butter to low income groups through the Metropolitan Development and Housing Agency, and a barbecue and watermelon feast sponsored by the Mayor's re-election committee.

In finding no bribery under these circumstances, the Supreme Court explained the bribery prohibition as follows:

> The prohibition of the Constitution and the statute involved here is directed to the giving or promising of rewards such as meat, drink, money or things of value for a vote to be elected to public office. Ms. Anderson and her attorney did not provide the District Attorney with a single instance wherein it was factually asserted that Mayor Fulton had given anything of value in exchange for a promise to vote for him in the Mayoral election. Implicit in the District Attorney General's letter of May 17 was the observation that the serving of food at a traditional political rally promoting a candidate for election to public office, to which the general public is invited, lacks the essential element of bribery, to-wit: that a voter is given food in exchange for his vote, which element was also not present in the distribution of butter and cheese.

Time and Use of Property Considerations

A county official has a duty not to neglect the duties of the office. Therefore, while outside activities are permissible, they can cause problems if taken to extremes. For example, a county clerk could sell computers during non-working hours, but if a contract called for the county clerk personally to train the purchaser's employees to use the new equipment during regular working

hours over the first month of operation, a serious question of neglect of duty could arise. Similarly, a small use of the telephone for personal business should not cause a problem, but if a property assessor were also, for example, a real estate broker, the assessor could not use the office in a dual capacity, official and private, without violating various duties and violating the prohibition against use of public property for private purposes, which would be a form of official misconduct. (T.C.A. § 39-16-402).

Criminal Offenses

In addition to the offenses discussed above, a county official should be aware of certain provisions of the state criminal code which may affect the official's duties. The statutes contained in T.C.A. § 39-16-101 *et seq.*, which set out the offenses against the administration of government, are of primary interest to most public officials and employees In addition to the provisions of the state criminal code, officials should be aware that there are a number of offenses that involve official misconduct, influence peddling, racketeering and wire and mail fraud that can serve as the basis for federal criminal prosecution.

Bribery Offenses. As discussed previously, the offense of bribery of a public servant is committed when a person offers, confers, or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion or other action in the public servant's official capacity. In addition to this bribery offense, there are several related bribery offenses which are discussed below.

> *Soliciting Unlawful Compensation*. A public servant who requests a pecuniary benefit for the performance of an official action knowing that he or she was required to perform that action without compensation or at a level of compensation lower than that requested has committed the offense of solicitation of unlawful compensation, a Class E felony. (T.C.A. § 39-16-104).
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> *Buying and Selling in Regard to Offices*. This offense is committed when any person holding any office, or having been elected to any office, enters into any bargain and sale for any valuable consideration whatever in regard to the office, or sells, resigns, or vacates the office or refuses to qualify and enter upon the discharge of the duties of the office for pecuniary consideration. This offense is also committed when any person offers to buy any office by inducing the incumbent thereof to resign, to vacate, or not to qualify, or when a person directly or indirectly engages in corruptly procuring the resignation of any officer for any valuable consideration. This offense is a Class C felony. (T.C.A. § 39-16-105).

It is an exception to the offenses of bribery, solicitation, and buying and selling public office that the benefit involved is a fee prescribed by law to be received by a public servant or any other benefit to which the public servant was lawfully entitled, and it is a defense that the benefit was a trivial benefit incidental to personal, professional, or business contacts, which involves no substantial risk of undermining official impartiality, or a lawful contribution made for the

political campaign of an elective public servant when the public servant is a candidate for nomination or election to public office. (T.C.A. § 39-16-106).

Misconduct Involving Public Officials and Employees. The criminal statutes relating to misconduct of public officials and employees are found in T.C.A. §§ 39-16-401 *et seq.* "Public servant" is broadly defined for these purposes as persons elected, selected, appointed, employed or otherwise designated as an officer, employee or agent of government; a juror or grand juror; an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; an attorney at law or notary public when participating or performing a governmental function; a candidate for nomination or election to public office; or a person who is performing a governmental function under claim of right although not legally qualified to do so. (T.C.A. § 39-16-401).

Official Misconduct. A public servant commits an offense who, with intent to obtain a benefit, or to harm another, intentionally or knowingly:

1. Commits an act relating to the servant's office or employment that constitutes an unauthorized exercise of official power,

2. Commits an act under color of office or employment (acting or purporting to act in an official capacity or take advantage of such actual or purported capacity) that exceeds the servant's power,

3. Refrains from performing a duty that is imposed by law or that is clearly inherent in the nature of the office or employment,

4. Violates a law relating to the servant's office or employment, or

5. Receives any benefit not otherwise provided by law.

It is a defense to prosecution that the benefit involved was a trivial benefit incidental to personal, professional, or business contact, and involved no substantial risk of undermining official impartiality. The offense of official misconduct is a Class E felony. (T.C.A. § 39-16-402).

Official Oppression. A public servant acting under color of office or employment (acting or purporting to act in an official capacity or taking advantage of actual or purported capacity) who intentionally subjects another to mistreatment or to arrest, detention, stop, frisk, halt, seizure, dispossession, assessment, or lien that the servant knows is unlawful, or intentionally denies or impedes another in the exercise of enjoyment of any right, privilege, power, or immunity, when the servant knows the conduct is unlawful, commits the Class E felony of official oppression. (T.C.A. § 39-16-403).

Misuse of Official Information. The Class B misdemeanor of misuse of official information is committed by any public servant who, by reason of information to which the servant has access in the servant's official capacity and which has not been made public, attains, or aids another to attain, a benefit. (T.C.A. § 39-16-404).

Persons convicted of official misconduct, official oppression or misuse of official information shall be removed from office or discharged from the position. A public servant elected or appointed for a specified term shall be suspended without pay beginning immediately upon conviction in the trial court and continuing through the final disposition of the case, removed from office for the remainder of the term during which the conviction occurred if the conviction becomes final, and barred from holding any appointed or elected office for ten years from the date the conviction becomes final. A public servant who serves at will shall be discharged upon conviction in the trial court. Subsequent public service shall rest upon the hiring or appointing authority provided that such authority has been fully informed of the conviction. (T.C.A. § 39-16-406).

Purchasing Property Sold Through Court. A judge, sheriff, court clerk, court officer, or employee of any court commits an offense who bids on or purchases, directly or indirectly, for personal reasons or for any other person, any kind of property sold through the court for which the judge, sheriff, court clerk, court officer, or employee discharges official duties. A bid or purchase in violation of this provision is voidable at the option of the person aggrieved. This offense is a Class C misdemeanor, with no incarceration. (T.C.A. § 39-16-405).

Penalties. The criminal code provides that violations which may be punished by one year or more of confinement or by death are felonies, and violations punishable by a fine or confinement for less than one year are misdemeanors (T.C.A. § 39-11-110). Felonies are classified as either A, B, C, D or E and misdemeanors are classified as A, B or C (T.C.A. § 40-35-110). Sentence ranges are assigned to each classification as follows (T.C.A. § 40-35-112):

Felony	Years of Sentence	Misdemeanor	Years of Sentence
A	15 - 60	A	up to 11 mos. 29 days
B	8 - 30	B	up to six months
C	3 - 15	C	up to 30 days
D	2 - 12		
E	1 - 6		

The presumptive sentence for a felony is the minimum in each range, but the judge may increase the sentence based on enhancing and mitigating factors. Sentencing considerations are codified in the Criminal Sentencing Reform Act of 1989, T.C.A. §§ 40-35-101 *et seq*. Offenses which are not classified and for which no penalty is specified are considered Class A misdemeanors. (T.C.A. §§ 39-11-111 and 39-11-114). Felonies for which no punishment is prescribed are considered Class E felonies. (T.C.A. § 39-11-113).

Ouster

Article 7, Section 1 of the TENNESSEE CONSTITUTION provides that county officers shall be removed from office for malfeasance or neglect of duty. The General Assembly has defined malfeasance, neglect of duty, and incompetency by statute (T.C.A. § 8-47-101). Under this statute county officials may be ousted from office for:

1. Knowingly or willingly engaging in misconduct while in office;

2. Knowingly or willingly neglecting to perform duties required by law;

3. Being intoxicated in a public place;

4. Engaging in illegal gambling; or

5. Committing any act violating any penal statute involving moral turpitude.

Decisions regarding whether a crime involves moral turpitude must be made on a case-by-case basis. In general, a crime involving moral turpitude reflects upon the moral fitness of a person, such as a crime involving dishonesty, murder, sale of drugs, prostitution, and possibly, any intentional and serious bodily harm to others. Many of the cases involving a determination of whether a crime is one of moral turpitude are those involving fitness for the granting of a license, such as a beer permit. For instance, the case of *Gibson v. Ferguson*[7] involved the question of a person's fitness for a beer permit. The case held that the offense of "rolling high dice for a Coke" and the offense of failing immediately to release seventeen bluegill fish were not crimes of moral turpitude. Generally, an official cannot be removed for a misdemeanor offense not involving a crime of moral turpitude, and not for a misdemeanor in office.

Ouster proceedings are civil proceedings and may be instituted by the attorney general, district attorney general, or county attorney, either on their own initiative or after a complaint has been made. (T.C.A. § 8-47-102). It is the duty of these persons to investigate all written complaints of misconduct by an official in their jurisdiction, and if the attorney determines that reasonable grounds exist for the complaint, to institute court proceedings to oust the official. (T.C.A. § 8-47-103). The privilege against self-incrimination may not be used by an official against whom ouster proceedings have been brought. (T.C.A. § 8-47-107). Citizens may also file ouster proceedings. (T.C.A. § 8-47-110). Ten citizens and freeholders are required to institute the proceedings, posting security for the costs of the lawsuit. Upon request by the citizens, the attorneys named above must provide assistance to these citizens. (T.C.A. § 8-47-107).

Upon a finding of good cause, an official may be suspended from office by the judge pending the final hearing of the case, and the vacancy thereby created is then filled as would be any other vacancy. (T.C.A. §§ 8-47-116, 8-47-117). The person filling the vacancy receives the same salary and fees which would have been paid to the suspended official. (T.C.A. § 8-47-121).

Either party to an ouster proceeding may appeal, but the appeal does not operate to suspend or to vacate the trial court's judgment or decree, which remains in force until vacated, revised or modified. (T.C.A. § 8-47-123). An official who successfully defends an ouster suit will be restored to office and will be allowed costs of the cause and the salary and fees of the office during the time of any suspension. (T.C.A. § 8-47-121).[8] Where the ouster is successful, however, the full costs of the action will be adjudged against the ousted official. (T.C.A. § 8-47-122).

As discussed previously, a conflict of interest violation. (T.C.A. § 12-4-101) can result in a county official being ousted and found ineligible to hold office for ten years. (T.C.A. § 12-4-102). In addition, a county official who fails to account for and pay over all taxes the official is required to collect may be removed from office and may be required to pay a penalty of 2% per month from the time the taxes would have been paid, plus attorneys' fees, and none of the amount due can be remitted after the matter has been placed in the hands of an attorney for collection. (T.C.A. § 67-1-1616). Suits may be filed to collect the amounts due by the state, the county or a city, and under some circumstances by taxpayers, according to the procedure established by statute. (T.C.A. §§ 67-1-1617 *et seq.*). Willful failure to pay into the state treasury the tax revenues collected on behalf of the state is a Class E felony. (T.C.A. § 67-1-1625).

Forfeiture of Retirement Benefits

A serious indiscretion late in a political career may have far-reaching effects on the official. The 2006 Ethics Act contains a provision that says, when an official runs for election to an office in this state, that official is deemed to consent to the forfeiture of retirement benefits if the official is convicted of a felony related to malfeasance in office. The section applies to both state and local elected officials. Therefore, if a county official who is elected this year is subsequently convicted of a felony related to malfeasance in office, the official forfeits his or her retirement benefits.

FEDERAL OFFENSES AND PROSECUTIONS

Hobbs Act

Many of the high profile scandals involving public officials in Tennessee have been federal prosecutions under the Hobbs Act. This includes the recent arrests that resulted from the "Tennessee Waltz" investigation. The Act was drafted originally to bust union and organized criminal activities in the 1930's. It has been interpreted to be a broad regulation of robbery and extortion that impact interstate commerce and has been applied to a wide range of scenarios. The Hobbs Act is found in federal statutes at 18 U.S.C.A. § 1951.

> § 1951. Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or

purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

There are two prime elements of the crime in a Hobbs Act violation:

1. Robbery or extortion, or an attempt or conspiracy to rob or extort, and

2. Causing the obstruction or delay of, or an effect upon, commerce.

Extortion by a public officer has been defined as the corrupt demanding and receiving by an officer, by color of office, of money or other thing of value, that is not due at all, or more than is due, or before it is due. The crime reaches not only the acceptance of money by an officer for performing his or her official duty, but also includes the acceptance of money for failing to perform a duty which the officer is duty bound to perform. Furthermore, it reaches a public officer's violation of a law or rule which it is incumbent upon the officer to obey.

SCENARIO:
State Official sits on a commission that has oversight and/or approval authority over state contracts or projects. If a representative of a bidding entity discusses an open bid/proposal/matter with that state official can that representative also discuss giving or actually give a campaign contribution to that official during that discussion without violating federal or state bribery and extortion laws? If not, when can that representative give a legal contribution?

Campaign Contributions

The U.S. Supreme Court has considered the issue of receiving a campaign contribution in exchange for taking legislative action. In *McCormick v. United States*, 500 U.S. 257 (1991) a

West Virginia legislator took money from foreign doctors to sponsor legislation allowing foreign doctors to practice and/or get licensed based on years of experience rather than taking the state exams.

The Supreme Court said: "The receipt of [campaign] contributions... is vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act." Id. at 273.

Factors to Consider When Taking Campaign Contributions:

The Supreme Court in *McCormick* did make note of the Court of Appeals' holding that the difference between legitimate and illegitimate campaign contributions was to be determined by the intention of the parties after considering specified factors. These included, but were not limited to:

- Whether the money was recorded by the payor as a campaign contribution,
- Whether the money was recorded and reported by the official as a campaign contribution,
- Whether the payment was in cash,
- Whether it was delivered to the official personally or to his campaign,
- Whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor,
- Whether the official had supported similar legislation before the time of the payment, and
- Whether the official had directly or indirectly solicited the payor individually for the payment.

896 F.2d 61, 66 (1990).

In the case of *Evans v. United States*, 504 U.S. 255 (1992), a Georgia county commissioner accepted campaign contribution from FBI agent posing as real estate developer who wanted re-zoning for a tract of land. The commissioner was arrested before re-zoning took place. This became a part of the commissioner's defense.

The Supreme Court said: "...We reject petitioner's criticism of the [jury] instruction, and conclude that it satisfies the *quid pro quo* requirement of *McCormick* ... because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the quid pro quo is not an element of the offense. We also reject petitioner's contention that an affirmative step is an element of the offense of extortion "under color of official right" and need be included in the instruction. We hold today

that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."

The 6th Circuit, in *United States v. Blanford*, 33 F.3d 685 (6th Cir. 1994), interpreted the *McCormick* and *Evans* decisions in a case involving a Kentucky legislator who accepted bribes for horse harness racing legislation. The 6th Circuit's standard is:

(1) That no affirmative step towards the performance of the public official's promise need be taken, and

(2) That the *quid pro quo* of *McCormick* is satisfied by something short of a formalized and thoroughly articulated contractual arrangement (i.e. merely knowing the payment was made in return for official acts is enough).

The word "explicit" in *McCormick* and *Evans* speaks not to the form of the agreement between the payor and payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated ("explicit" does not mean "express").

In *Blanford*, the 6th Circuit goes on to speculate whether campaign and non-campaign contributions should follow the same standard. No decision is reached, but the court notes that campaign contributions have a presumption of legitimacy based on the way the American political system works, while other payments would be questionable. The court was careful to say that they do not mean to imply that a non-campaign contribution payment is *ipso facto* a Hobbs Act violation (e.g. *de minimus* amounts are at stake or a legal defense fund).

Other points of interest:

1. Does "extortion" require proof of actual or threatened force?

Proof of actual or threatened force, violence or fear is not necessary as long as the evidence shows that there was a wrongful taking by a public official or money or property not due that officer or office.

Returning to the previously cited *U.S. v. Blanford*, the 6th Circuit upheld a jury instruction that the "Government must prove that the defendant intended to obtain property or pay to which he was not entitled with the knowledge that the property or payment was being given in return for an official act or an exercise of official authority in regard to legislation." Coercion is not required.

2. Reasonable Belief: Can someone without actual power be found guilty?

An official does not need to have "*de jure*" power to perform the act which is the basis of the extortionate scheme so long as the extorted person has a reasonable belief that the official has such power.

In *United States v. Collins*, 78 F.3d 1021 (6th Cir. 1996) the 6th Circuit concluded that the Hobbs Act reaches public employees who may lack the actual power to bring about official action, but create the reasonable impression that they do possess such power and seek to exploit that impression to induce payment.

See also *U.S. v. Bibby*, 752 F.2d 1116 (6th Cir. 1985). Former state senator had no de jure power to ensure a contract for the sale of computers to Shelby County, but his "past performance on a state contract, combined with his assurances that he had 'influence in Shelby County' were sufficient to create a reasonable belief that he county deliver the goods."

3. Who is a public official for the purposes of the Act?

Any public officer clothed with official privileges and duties may be prosecuted for the offense of extortion under color of office, whether he or she is a federal, state, or local officer or an executive, legislative, or judicial officer (31A AMJur 2d Extortion Section 9). This would include and has included many instances of state and local commissioners with authority over public projects.

4. Inducement: The public official DOES NOT have to be the "Initiator" or "Inducer" of the alleged payment.

In *United States v. Hedman*, 630 F2d 1184 (7th Cir. 1980), the 7th Circuit held that "inducement" in the sense that the payment was overtly solicited by the public official is not an essential element of the crime.

See also *U.S. v. Nelson*, 486 F.Supp 464 (W.E. Mich. 1980). In that case, a Michigan state senator was approached by a lobbyist to introduce legislation to legalize pari-mutual wagering on greyhound racing. In exchange for introducing the legislation, the senator accepted a $5,000 "loan" from the lobbyist. This was held sufficient to constitute a violation of the Act.

5. Actual receipt of payment/benefit:

A mere promise or agreement to pay is not sufficient to constitute extortion, but the benefit does not have to be personally received by the official, rather it can go to something or someone else (e.g. a campaign, family, business, PAC, non-profit, etc.). This pattern appears in the allegations currently pending against Washington lobbyist Jack Abramov. The case of *United States v. Trotta* 525 F.2d 1096 (1975, CA2 NY), involved circumstances where a public official was demanding and inducing a payment in political contributions to a local political committee from an engineering firm that was working and bidding on public works projects. The court held that the fact that the benefit of money went to a political committee did not lessen the official's culpability.

ENDNOTES

1. *Attorney General Opinion dated July 15, 1983.*
2. *Attorney General Opinion 84-067 (2/16/84).*
3. *Attorney General Opinion No. 85 (11/01/79).*
4. *"Gratuities May Cause Severe Implications for County Officials", Tennessee County News, March-April, 1982.*
5. *Clariday v. State of Tennessee, 552 S.W.2d 759 (1976); State v. Prybil, 211 N.W.2d 308 (Iowa 1973).*
6. *State ex rel. Anderson v. Fulton, 712 S.W.2d 90 (Tenn. 1986).*
7. *562 S.W.2d 188 (Tenn. August 30, 1976).*
8. *Marshall v. Sevier County, 639 S.W.2d 440 (Tenn. Ct. App. 1982).*